Orr Ewing case fraud does not appear to have been pleaded in so many words yet James, L.J. found what really amounts to exactly the same finding as that complained of in the present case. The words of the Lord Justice (at p. 453) are so apposite to the present case that I will conclude by paraphrasing them substituting the expression "trade name" for "trade mark":—

> "Now what could have been the only motive of the Defendants which can be suggested to a man of the world by a man of the world in doing that but to do something which was likely to cause their goods to be mistaken for the Plaintiffs' goods and to be accepted by the customers of the man who had been in the habit of selling them as being a continuation of the same goods which he had been in the habit of supplying to them? It is not necessary for this case that a man actually intended to tell a lie or that a lie has been told. It is sufficient that a man should wilfully use the trade name of his neighbour calculating thus to enable his goods to be passed off for the goods of his neighbour. I am of opinion that it was probable and probable almost to a certainty that the name used by the Defendants would tend to enable anybody so minded to represent those goods as being goods of the same character proceeding from the same manufacturers as the goods which had been formerly accepted with confidence under the trade name of the Plaintiffs. It was calculated to do so. Beyond that suppose a man had by accident inadvertently used a trade name so calculated to deceive the ultimate purchaser and therefore so calculated to injure the Plaintiffs in their legitimate right of property in a trade name, the moment that man's attention was called to the fact of the similarity and to the complaint of the persons who owned the first trade name that it was likely to injure them it was his duty immediately to discontinue the use of the trade name complained of and however honest or inadvertent the original mistake may have been, the continuation of the use of it after that was pointed out is itself sufficient evidence of a fraudulent intention. The fraud would then consist in continuing to do it even if there had been an original inadvertence in the use of it. But I am bound to say in this case that I am not on the evidence satisfied that there was any innocent inadvertence or mistake. I am not satisfied that there was not from the first an original intention to use the same trade name as the Plaintiffs' with the intent to enable the Defendants' goods to be passed off as the Plaintiffs' goods."

I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the Plaintiffs (Respondents)—*Sisson & Delay.*

Solicitors for the Defendants (Appellants)—*Donaldson & Burkinshaw.*

MALACCA.

[ORIGINAL CIVIL JURISDICTION]

IN THE MATTER OF THE PETITION OF RIGHT OF N.P.L.R.M. VAIRAVAN CHETTIAR, Petitioner (Plaintiff).

vs.

THE ATTORNEY-GENERAL OF THE STRAITS SETTLEMENTS ..... Defendant.

[MALACCA CROWN SUIT No. 3 of 1932]

Crown Suits—wrongful arrest by Police Constable—damages—liability of Crown—remedy by Petition of Right.

Where a Police Constable, having been handed a warrant of arrest with instructions to ask the complainant in the case to point out the accused named therein, brought the complainant in handcuffs to the Police Station, in an action against the Government for damages for wrongful arrest,.

Held, that the Government was liable inasmuch as the act of bringing the complainant in itself though authorised was done in an unauthorised manner.

Barwick v. *English Joint Stock Bank*, L.R. 2 Ex 259, *Mackay* v. *Commercial Bank of New Brunswick*, L.R.C. P.C. 394 and *Lloyd, Grace Smith & Co.*, (1912) A.C. 733 applied.

Action tried by Terrell, J. on the 12th and 13th days of October, 1932. The findings of fact and the arguments are related in the judgment below.

Walters (*Munro* with him) for the Plaintiff.

Pedlow, Solicitor-General for the Crown.

Cur. Ad. Vult.

TERRELL, J.—The Petitioner in this suit is one N. P. L. R. M. Vairavan Chettiar carrying on business at No. 66 First Cross Street, Malacca, and is hereafter referred to as the "Plaintiff."

It appears that on the 8th June 1932 a warrant had been issued at the instance of the plaintiff for the arrest of four Chinese, only one of whom was mentioned by name (Exhibit A) The warrant was after issue delivered by a Police Court peon to a clerk in the Chief Inspector's office for necessary action. Sergeant Hassan who was in charge of the Central Station on the afternoon of the 8th June had collected at the police station a Lance-Corporal, two police constables and a detective for the purpose of executing the warrant. The warrant itself was handed to P. C. 607. According to paragraph 2 of the Answer, the P. C. was instructed to ask the

Petitioner to come to the Central Police Station for the purpose of pointing out the person on whom the warrant was to be served. In his evidence Sergeant Hassan elaborated this and said he told the P. C. that the warrant was for the arrest of some Chinese. In the face of the pleadings I must consider this latter statement as an after-thought. I also prefer to accept the P. C.'s evidence on this point which was as follows:—

> "It was a warrant to arrest a man. He did not tell me clearly who was to be arrested. I thought I should go and bring the Chetty and then would be told who to arrest."

It is true that the P. C. afterwards made various contradictory statements and I will comment on his evidence later, but the fact remains that at the very beginning of his examination-in-chief he admitted that he did not know who was to be arrested on the warrant.

Anyway, the warrant was handed to the P. C. at 4.50 p.m. and an hour later at 5.55 p.m. he returned with the plaintiff in handcuffs. The sergeant ordered his immediate release. The matter was referred to Inspector Sharp and it may be inferred that the P. C. was severely taken to task as he received punishment as a defaulter. This is important in connection with the entries which the P. C. made in his note book after returning to the Central Station with plaintiff. That same evening the plaintiff made a report complaining of his arrest. The story he told is substantially the same as that given at the trial and supported by the plaintiff's witnesses.

On the pleadings as they stand, there should have been no conflict of evidence, as paragraph 2 of the Petition which details the circumstances as a consequence of which the plaintiff claims relief, is admitted in full in the Answer. As the case proceeded, however, it was clear that there would be a considerable conflict as to what happened at No. 66 First Cross Street when the plaintiff was arrested. The cross-examination of the plaintiff's witnesses indicated that the P. C. would say that he had been assaulted by the plaintiff and his friends, as a result of which he had arrested him. The P. C. in his own evidence did allege an actual assault but in his note book he only stated that the people present "wanted to assault him." I think that if it had been part of the Crown case that the act in arresting the plaintiff of the P. C. was an independent act prompted by an assault or by fear of an assault, the Answer should have so alleged, and I do not think that the Crown is excused by the peculiar wording of Section 22 (6) of Ordinance No. 22 (Crown Suits) from pleading the necessary facts which may be put forward to support an objection in point of law. The Crown is required to admit or deny any allegation of fact. What happened in this case was that the Crown while admitting the facts alleged by the plaintiff, apparently relied on other facts about which the pleading was silent. This should have been dealt with by what is known as "a confession and avoidance," and no authority was cited to show that the Crown need not, as other litigants must, plead the necessary facts which are to be alleged at the trial. Without relying on any inference to be drawn from the state of the pleadings, it is clear that counsel for the Crown was instructed that the P. C. had been assaulted. This is not borne out either by the P. C.'s own note book or that of the sergeant who said "The P. C. said the Chetty wanted to assault me." It is also quite probable that the P. C. did later allege a threatened assault, but it must be remembered that he had by this time fully realised that he had done the wrong thing and was seeking an excuse for his conduct.

The plaintiff's case was that the P. C. arrived at the house and asked for the plaintiff and that as soon as he was pointed out he was arrested and handcuffed. Two eye-witnesses were called apart from the plaintiff, P. R. S. P. Narayanan Chettiar and A. K. R. M. Ramasamy Chettiar. The plaintiff was only called at my suggestion at the close of the Petitioner's case. Counsel for the Crown commented on this and pointed out that as he had been in Court and had heard the evidence of the other witnesses his own evidence was of correspondingly less weight. This may be so, but I have no doubt that if counsel for the plaintiff had been aware that there would be a conflict of evidence he would have put the plaintiff in the box first in the usual way. As it was, he merely called two independent witnesses to give formal evidence of facts which had already been admitted in the pleadings. The omission to call the plaintiff first was therefore another consequence of the Attorney-General in his Answer failing to plead the facts on which he proposed to rely, and I cannot blame plaintiff's counsel for calling the evidence as he did.

It appears that there was considerable discussion as to the propriety of arresting the plaintiff at and immediately after the time of his arrest. P. R. S. P. Narayanan Chettiar asked to have a look at the warrant and the P. C. showed it to him. He could read a little English and seeing the plaintiff's name at the bottom of the warrant he would know that it was a warrant taken out at the instance of the plaintiff and not for the arrest of the plaintiff. He thought it was for the arrest of some Chinese and told the P. C. so. The P. C. however, is alleged to have said that he had been told to arrest the Chetty. Then an English speaking Tamil by name Tambyiah, who is in Government service, was called in. He read the warrant and explained what it was about.

According to the P. C.'s own record in his note book Tambyiah told him to let the Chetty go otherwise he would get into trouble. The P. C. however replied "if I have arrested him I can only discharge him at the Police Station." That can be taken as the P. C.'s idea of what his duties were. Anyway, he insisted on taking the plaintiff handcuffed to the police station.

For the Crown the only evidence inconsistent with that of the plaintiff's witnesses is the evidence of the P. C. No. 607. His name was Varghese Kurian and he was found to be a Syrian Christian. The Syrian Christians form a small community in Southern India. He spoke Malayalam, but the entries in his note book were written phonetically in Malay with Malayalam characters. The trouble that whereas Malayalam could readily be interpreted as spoken by the Tamil Court interpreter the characters in the written language are different to Tamil. It was accordingly necessary to call in a Malayalee, A. K. Menon, to assist in deciphering the note book. In addition P. C. No. 607 was a man of poor intelligence only partially familiar with Malay as is shown by the fact that he wrote 'sahya marah tangkap' i.e. 'I was angry (to) arrest him' when he wished to say 'sahya mau tangkap' i.e. 'I wanted to arrest him.' He also wrote 'pergi itu,' which is meaningless, for 'bagitu' meaning 'immediately.'

The entries in the note book commence at 4.50 p.m. when he received orders from Sergeant Hassan "to go and call the complainant a Tamil N. P. R. L. M. Vairavan Chetty." Then there is an entry at 4.55 announcing somewhat superfluously "I P. C. 607 arrive at Kampong Kling (i.e. Cross Street) No. 66."

The next entry is timed 5.30 but was made after the P. C.'s return to the police station. It states that he informed the plaintiff that the warrant for the arrest of the Chinese had been issued and that he asked the plaintiff to come and point them out. Then he proceeds to state that other Tamils came and wanted to strike him. So he was afraid and arrested the plaintiff. Then follows the conversation with Tambyiah.

Now this note book would of course be very good evidence if it could be relied on. Unfortunately I am able to attach no weight to it whatever except in so far as it contains admissions. I have already observed that before he made the 5.30 entries the P. C. had already been censured by the sergeant and that he may have alleged the threatened assault to excuse his conduct. There is, however, no support for the allegation that an assault was threatened. The two Chetty witnesses deny it and Tambyiah saw no sign of any disturbance. It was also admitted by the Sergeant Hassan that in the course of 18 years experience he had never heard of a Chetty assaulting a P. C. Apart from that there is no conceivable reason why the plaintiff should cause trouble because he was wanted to assist in executing a warrant which had that very day been issued at his request. I have no hesitation, therefore, in finding that there was no assault or even threatened assault by the plaintiff or any of the Chetties on the P. C. and that the story told by the plaintiff's witnesses of what happened is substantially correct.

It would of course support the P. C.'s evidence if one could accept the first of the 5.30 p.m. entries to the effect that he wanted the Chetty to point out the Chinese. Unfortunately, however, the note book shows very clearly that the entry down to the words 'lain lain kling' i.e. "other Tamils," are not the original entries but have been written in over other entries which have been erased. From this I conclude that the entries never contained any reference to the arrest of the Chinese and that his original statement was correct that he did not know who was to be arrested. In the course of his evidence he said at different times that the name of the Chetty was on the warrant as one of the persons to be arrested and also that the warrant was not for the arrest of the Chetty. I have no doubt that when he received his instructions from the sergeant he was just as hazy as to what he was to do, as he was in the witness box as to what he was to say. He did, however, realise that a Lance-Corporal, two P. C.'s and a detective were waiting at the police station and that he was to bring the Chetty to the police station. It may have been that there was some delay and that in an excess of zeal he handcuffed the Chetty so as to secure his attendance quickly, or it may be that he simply misunderstood his instructions and thought that he was required to arrest the Chetty. In any case he was in his own mind carrying out the instructions which he had received from his superior officer which were to bring the Chetty to the police station. Of course, he had no instructions to arrest the Chetty but this only means that he was doing an authorised act in an unauthorised way.

It has been necessary to go closely into the facts before considering the law as such of the argument of counsel for the Crown was based on a view of the facts which I found it quite impossible to accept. Having found the facts as I have, the application of the law does not present so much difficulty.

There can be no doubt that the remedy of a Petition of Right is available in the Colony even when the claim is based on the tortious act of a servant of the Crown (see *Attorney-General of the S.S.* v. *Wemyss*, 13 A.C. pages 192 and 196, and *Attorney-General of the S. S. v. Pang Ah Yew* (1925) A.C. pages 555 and 558) and I do not think it can be disputed that in respect of such claims the Crown is in the same position

as an ordinary employer. It was indeed argued that the P. C. was acting under a statutory authority and that as there was no statutory authority for the arrest of an innocent person, the P. C.'s superior officers could not have arrested the plaintiff and accordingly could not have authorised the P. C. to do so. This is in substance an argument put forward on behalf of the Crown in the case of *Attorney-General of the S.S.* v. *Pang Ah Yew*, (1925) A.C. page 555, but the Privy Council would not accede to the view that the Collector of Land Revenue was acting under statutory authority merely because his duties were in part defined by Ordinance No. 35 of 1886. At page 559 the judgment proceeds:—

> "In collecting the revenue of the Crown the collector was undoubtedly acting as the agent or servant of the Crown, and the fact that he is carrying out his duties under statutory directions and limitations cannot make any difference. He is the intermediary employed by the Crown, even though the methods by which he is to proceed are prescribed by the Ordinance, and it is to be noted that under s. 13 of the Ordinance, powers are given to the Governor in Council to make rules for carrying out the provisions of the said Ordinance."

Exactly the same reasoning is sufficient to dispose of the argument based upon Ordinance No. 16 (Police Force).

The same argument was used in a different form for the purpose of contending that as the Crown had no power themselves to arrest an innocent person, the P. C. could not have been authorised to make the arrest and so was acting outside the course of his employment or the scope of his authority. The question whether or not what the P. C. did was within the scope of his authority is really the only issue in this case, because the mere fact that the act of the servant amounts to a criminal offence will not exonerate the master if it is done in the course of his employment (see Clerk and Lindsell on Torts, 8th Edition, Page 72). In the case of *Lloyd* v. *Grace, Smith & Co.*, (1912) A.C. page 716, Lord Macnaghten at page 736 treats the expressions "acting within his authority," "acting in the course of his employment" and "acting within the scope of his agency" as meaning one and the same thing, though in the circumstances of a particular case one expression may be more appropriate than another, and he says that there can be no doubt that the principal is liable for the torts and negligences of his servant, provided that the tort or negligence occurs in the course of the employment or agency (see page 737).

It was at one time thought that it was impossible to make an employer liable for his servant's tortious acts unless they were for the employer's benefit, and this was one of the chief arguments on behalf of the respondents in the case of *Lloyd v. Grace Smith*. The judgment of the House of Lords, however, makes it abundantly clear that the benefit of the employer is not the proper test, though if the employer has taken an advantage from his servant's wrong that is an additional ground for holding him liable (see page 738).

In many cases the chief difficulty is for the Court to determine whether the particular act complained of was the kind of act authorised, or whether, if not expressly authorised, it was impliedly authorised. This consideration was of vital importance in the case of *Poulton v. L. & S. W. Railway Co.*, L.R. 2 Q. B. page 534, where the Company had no power to arrest for the non-payment of freight on goods. The fact that the Company had only statutory powers which did not include a power of arrest in such cases was treated as conclusive that they could not have authorised a station master to effect such an arrest and accordingly were not liable. It is to be remembered that the act complained of was not the manner in which the plaintiff was arrested but the fact that he was arrested at all. But in any case no reliance can be placed on this case except by statutory bodies and I have already found that in this case the Crown must be treated on the same footing as an ordinary employer.

There is no such difficulty where the act complained of is an unauthorised way of doing an authorised act and in my view the P. C. was doing an authorised act. He was told to bring the Chetty to the police station and he carried out his orders. He merely erred in the methods he employed to ensure the Chetty's attendance.

It appears to me that the statement of the law by Willes J. in the case of *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. page 259, is exactly in point He says at page 266:—

> "In all those cases it may be said, as it was said here, that the master had not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

This *dictum* has been approved both in the Privy Council in *Mackay v. Commercial Bank of New Brunswick* L. R. C. F. C. page 394, and by the House of Lords in the case of *Lloyd v. Grace, Smith & Co.*, (1912) A.C. at page 733.

The act complained of must of course be connected with the particular act which the servant was authorised to do. The Crown would not be liable if the P. C. had arrested some third party quite unconnected with his particular duty or if he had shot the Chetty instead of bringing him to the police station, but in this case I have no hesitation in finding that the P. C.'s act in arresting the Chetty was immediately connected with the duty which he was authorised to carry out. I also find that in arresting the Chetty the P. C. conceived that he was acting in his employer's interest. The Crown therefore must be held liable for the P. C.'s act.

As regards damages, the plaintiff adduced evidence that his loans from other Chetties had been called in and that he could not renew them until a meeting of elders in India had discussed and decided on the question of his arrest. It was sought to prove that the plaintiff had suffered a direct pecuniary loss which could be estimated in dollars. The Solicitor-General submitted that this was evidence of special damage and had not been pleaded. I think this submission is sound and that the evidence should be disregarded though it might have saved time if the evidence had been objected to when it was called.

I am, however, entitled to give general damages and considering the fact that the plaintiff is carrying on business in Malacca and was led in handcuffs through the streets of the town in broad day light, I have no doubt that his reputation must have been injured. I assess the damages at $1,000. The respondents must pay the petitioner's costs. Costs to be taxed on higher scale.

Judgment accordingly.

Solicitors for the Petitioner—*Allen & Gledhill.*

[APPELLATE CRIMINAL JURISDICTION.]

REX ..... **Respondent**

vs.

ONG SUAN.....**Appellant.**

[MALACCA CRIMINAL APPEAL No. 4 OF 1932.]

Ordinance No. 158 (Tobacco Duties) Sections 9, 21, 52.—Offence—Confiscation of car—Criminal Procedure Code, Section 428.

Section 9 (1) of Ordinance No. 158 (Tobacco Duties) is prohibitory and the onus is on a person charged under that subsection to prove that he has complied with the regulations and restrictions.

It is illegal to import tobacco into Malacca by road as no place has been appointed as an examining station for tobacco so imported.

A magistrate has no option but to order the forfeiture of a motor car by which it is proved that tobacco has been illegally imported.

The appellant was charged before W. G. Reeves, Esq., Police Magistrate Malacca as follows:—

1. That he on or about the 8th day of August 1932 at about 7 p.m. at Kubu, Malacca, did sell dutiable tobacco stored elsewhere than in a bonded warehouse, contrary to Section 21(2) Ordinance 158.
2. That he, on or about the 8th day of August, 1932, did import dutiable tobacco not in accordance with such regulations and restrictions as prescribed, contrary to Section 9(1) of Ordinance 158 as amended by Ordinance 33 of 1926.

The accused claimed trial but after some evidence had been given by the prosecution the accused pleaded guilty to the two charges but elected to give and was permitted to give evidence on oath to prove that he acted in ignorance of the law. In the course of his evidence he said "I brought the tobacco in my own car M 386."

The amount of duty payable on the tobacco which had been imported into Malacca by road from Johore was $426.30.

The accused was convicted and was fined $300 or 3 months' Rigorous Imprisonment on each charge, the terms of imprisonment to be consecutive if the fines were not paid.

The accused appealed against sentence.

On the hearing of the appeal Counsel for the appellant applied for leave to add as a further ground of appeal (of which he had given previous notice to the Deputy Public Prosecutor) that the second charge stated no offence in point of law.

Munro for appellant. Section 9(1) speaks of regulations which mean rules made under the Ordinance and not the Ordinance itself. Ordinance No. 131 (Interpretation) Section 2 (d) "Restriction is cognate to regulation." Maxwell on Interpretation 6th Ed. p. 574. No regulations have been made by the Governor in Council on the matter and therefore none have been contravened.

Mc Elwaine D.P.P. for the Crown. Ordinance 131 only defines when context does not imply a different meaning. The section itself prescribes the regulations and restrictions. Contravention of Section 9 is punishable under Section 49. Section 9 forbids importation of tobacco into Malacca except in prescribed ways. As no place has been appointed under subsection (4) importation by road is absolutely forbidden. Accused must satisfy the Court that he imported legally.

Munro in reply

Cur. Ad. Vult.

TERRELL, J. The accused was convicted of selling dutiable tobacco in contravention of Section 21(2) of Ordinance No. 158 (Tobacco Duties) and of importing dutiable tobacco in contravention of Section 9(1) of the same Ordinance.

The accused pleaded guilty and was fined $300 on each charge.

The original appeal was merely against sentence, but at the bar Mr. Munro did not proceed with the appeal against sentence, and obtained leave to enlarge the time for appealing against the conviction on the second charge on the ground that the charge disclosed no offence in law.